INDEX

	Page
OPINIONS BELOW	1
JURISDICTION	2
QUESTIONS PRESENTED	2
CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED	3
STATEMENT OF THE CASE	3
REASONS FOR GRANTING THE WRIT	9
CONCLUSION	17

CITATIONS

CASES	Page
Belgum v. City of Kimball, 136 Neb. 744, 81 N.W.2d 205 (1957)	9
Bernstein v. Bush, 29 Cal. 2d 773, 177 P.2d 913 (1947)	13, 15, 16
Broderick v. Stevenson Consolidated Oil Co., 88 Mont. 34, 290 Pac. 244 (1930)	9
Halbouty v. Darcey, 326 S.W.2d 528 (1959)	14
Hunter v. Justices Court of Centinela TP., Los Angeles County 36 Cal. 2d 315, 223 P.2d 465 (1950)	15
Jenel vs. Green Island Drain Co., 12 Neb. 163, 10 N.W. 547 (1881)	11
Krone v. Lacy, 168 Neb. 792, 97 N.W.2d 588 (1959)	9
Ohio Oil Company v. Indiana, 177 U.S. 190, 20 S. Ct. 576 (1899)	12

Pattie v. Oil & Gas Conservation Commission,
145 Mont. 531, 402 P.2d 596 (1965) 16

Richfield Oil Corporation v. Crawford,
241 P.2d 1020 (1952) 12

CONSTITUTIONAL PROVISIONS AND STATUTES

Page

Constitution of the United States

Article XIV 10

Constitution of the State of Nebraska

Section 3 of Bill of Rights 10, 11

Section 21 of Bill of Rights 10

Nebraska Revised Statutes of 1943

Section 57-903(8) 5

Section 57-903(10) 5

Section 57-908(3) 5

Section 57-910(10) 4, 11

IN THE

Supreme Court of the United States

October Term, 1969

No.....

FRANKLIN W. BAUMGARTNER

and

THE STATE OF NEBRASKA,

Petitioners

v.

GULF OIL CORPORATION

Respondent

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF NEBRASKA

The Petitioners Franklin W. Baumgartner and the State of Nebraska respectfully pray that a writ of certiorari issue to review the judgment and opinion of the Supreme Court of Nebraska entered in this proceeding on May 9, 1969.*

OPINIONS BELOW

The opinion of the Supreme Court of Nebraska, not yet reported, appears in the Record submitted herewith, Pages 45-66. The opinion of the trial court, the District Court of Banner County, Nebraska, is included in the certified record submitted with this petition at Pages 27-31.

*The State of Nebraska became a Plaintiff Intervenor and joined in the relief sought by petitioner Baumgartner. For the purpose of this petition, the use of the term "Petitioner" will be applicable to both such parties. The original defendant in the trial court was the British American Oil Producing Company and Gulf Oil Corporation was later substituted therefor. For the purposes of this petition said parties will be identified as the "defendant".

JURISDICTION

The judgment of the Supreme Court of Nebraska was entered on May 9, 1969. A timely petition for rehearing was denied on September 16, 1969, and the petition for certiorari was filed within 90 days of that date. This Court's jurisdiction is invoked under 28 U.S.C. § 1257 (3).

QUESTIONS PRESENTED

1. As a matter of Nebraska constitutional and statutory law, and in light of the provisions of the Constitution of the United States, may one be precluded from drilling on his lands to recover the oil and gas thereunder while at the same time the adjoining owners are permitted to conduct a secondary waterflood project which sweeps the oil off the non-drilling party's land and which oil is then recovered by the party conducting the secondary recovery project, and all without compensation to the non-drilling party.

2. As a matter of Nebraska statutory law which expressly provides that a unit agreement for the recovery of oil is only binding upon the parties who execute the agreement, may such an agreement be so applied as to take away the property of one who is not a party to such unit agreement and with such taking being without due process or compensation for the oil so taken and in violation of the Constitutions of the United States and the State of Nebraska.

3. May any party conduct such operations that are known will sweep oil off another party's land where such party is precluded from drilling, and which oil is recovered from the lands operated by the same party who is conducting the waterflood project, and without compensation to the non-drilling party, all in violation of the Constitution of the United States and the State of Nebraska.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Article XIV of the Constitution of the United States; Section 3 and 21 of the Bill of Rights of the Constitution of the State of Nebraska. Nebraska Revised Statutes of 1943, 57-910(10), 57-903(8), 57-903(10), 57-908(3).

STATEMENT OF THE CASE

Petitioner Baumgartner sought damages for the taking of oil by defendant from the lands covered by petitioner's oil and gas lease, which taking was caused by the injection of water in the lands of defendant, the forcing of that water on to the lands of petitioner and the further forcing of the oil off of the petitioner's land and on to the lands of defendant where the oil was recovered, and all during the time when the petitioner was denied the right to drill on his lands. Upon the trial of the issues petitioners were awarded damages in the total amount of $89,933.00 for the oil so swept off the lands and recovered by the defendant. (R: p. 33)

Petitioner Baumgartner raised the constitutional matters in his original petition as filed in the Trial Court (R: Par. 5, p. 3), (R: Par. 11, p. 6), (R: Par. 6, p. 7). The Supreme Court in its decision ignored the constitutional rights of petitioners when it stated ". . . that the correlative and constitutional right of a landowner or leaseowner is not the right to drill . . ." (R: p. 62)

The denial of the right of petitioner to drill on his land was affirmatively supported by the defendant, who, and as stated, while that right was being denied, swept the oil off of petitioner's land *and which oil* was recovered by the defendant.

Before discussing the constitutional question involved it is necessary to set forth the factual situation, the conti-

nuity of events, and the statutory and case law applicable thereto, all of which is summarized as follows:

1. Under date of June 13, 1960, and for the payment of $12,864 therefor, petitioner was awarded the oil and gas lease from the State of Nebraska acting by and through the Board of Educational Lands and Funds, and which lease covered all of Section 16, Township 18 North, Range 53 West, Banner County, Nebraska.

(a) A lessee under a prior lease covering the same lands here involved had drilled a dry hole in the approximate center of the NE¼NE¼ of said Section 16; also, petitioner had drilled a dry hole in the SW¼NW¼ of said Section 16.

2. On April 18, 1961, the Nebraska Oil and Gas Conservation Commission entered its order approving the Kenmac Unit Agreement and the secondary recovery program by waterflooding of the area subject to said Unit Agreement. Petitioner did not join the Unit Agreement and the lands subject to his oil and gas lease were not incorporated in the area to be waterflooded by the secondary recovery program. (R: Par. 4, p. 28)

The Nebraska Oil and Gas Conservation Act (Revised Statutes, Nebraska, 1943) then in force and relating to unit agreements, provided in part as follows:

57-910(10) " . . . An agreement for the unit or cooperative development and operation of a field or a pool, or a part of either, . . . is authorized and may be performed, and shall not be held or construed to violate any of the statutes of this state relating to trusts, monopolies, or contracts and combinations in restraint of trade, if the agreement is in the public interest, protective of correlative rights, and reasonably nec-

essary to increase ultimate recovery or to prevent waste of oil or gas. *Such agreements bind only the persons who execute them, and their heirs, successors, assigns and legal representatives.*" (emphasis added)

3. Part of the oil and gas pool was located under petitioner's land and it was stipulated by the parties that the recoverable oil from that part of the lands covered by the lease held by petitioner was 38,878.3 barrels of oil, and which stipulation was adopted by the Trial Court. (R: Par. 10, 11 and 12, p. 29 and 30)

4. Petitioner, attempting to exercise his right to recover the oil under his lands, and having no well on his lands, filed his application for a permit to drill a well on the lands subject to his lease at a location which was then thought could be productive of oil; that application was denied by the Nebraska Oil & Gas Conservation Commission (R: Par. 8, p. 29) even though and at such time the Nebraska Oil and Gas Conservation Act provided in part as follows:

57-903(8) " . . . Owner shall mean the person who has *the right to drill* into *and produce* from a pool and to appropriate the oil or gas *he produces therefrom* either for himself or for himself and others." (emphasis added)

57-903(10) "Correlative rights shall mean the opportunity afforded *to the owners of each property* in a pool to produce, as far as is reasonably practicable to do so without waste, his just and equitable share of the oil or gas, or both, in the pool." (emphasis added)

57-908(3) " . . . Upon application of the person *entitled to drill* and after hearing, if the

Commission finds that a well drilled at the prescribed location would not produce in paying quantities, or all such surface conditions would substantially add to the burden or hazard of drilling such well, the Commission is authorized to enter an order permitting the well to be drilled at a location other than that prescribed by such specifying order; provided, the Commission shall include in the order suitable provisions to prevent the production from the spacing unit of more than its just and equitable share of oil and gas in the pool." (emphasis added)

5. Petitioner, maintaining that under the factual situation presented to the Commission and believing that the statute gave him, as owner, the right to drill, and further believing that the Commission was authorized to issue a permit as to the drilling of a well on petitioner's land, sought review in the District Court (as provided for in the statute) to set aside the order of the Commission in denying the petitioner the right to drill. The District Court on June 13, 1963, reversed the order of the Commission and held that the petitioner was entitled to the permit to drill at the requested location. (R: Par. 8, p. 29)

NOTE: It should be noted that no appeal was taken from that decision of the District Court to the Supreme Court of the State of Nebraska. Therefore, and under all rules of procedure, and insofar as the parties here are concerned, *that right to drill was unequivocally fixed and established.* (emphasis added)

6. Pursuant to the decree of the District Court, the Oil and Gas Commission had a further hearing of the issues and on February 16, 1965 the Commission held that petitioner was entitled to a permit to drill on the original application filed by petitioner in 1961.

7. However, by the time the Commission granted petitioner the right to drill, the water injected by the defendant had so encroached in the formations under petitioner's land, the oil thereunder had been or was being swept off his lands, and the drilling of a well by petitioner would only have recovered the water injected by the defendant.

(a) The District Court, in its decree entered on June 13, 1963, also found that the operations of the defendant had at that time already caused water to encroach in the oil and gas formation underlying the lands covered by petitioner's oil and gas lease.

(b) The Commission, at the time of actually issuing the permit to drill in 1965, found that the operations of defendant had caused water to encroach in the stated formations in the lands covered by petitioner's oil and gas lease, and that the oil which was originally present there had been or was being swept off the lands.

8. Petitioner then filed suit for damages for the taking of the oil so swept off his lease, and on July 2, 1968 the Trial Court entered judgment in favor of petitioner and the intervenor State of Nebraska for $89,933.00, which petitioner and the defendant had stipulated was the value of the oil recoverable from petitioner's lands, less a sum to be allowed defendant as its cost of operation in recovering the oil. (R: Pages 27 - 31)

9. On appeal to the Supreme Court of Nebraska by the defendant, the Supreme Court reversed the judgment of the Trial Court holding that petitioner was limited to a recovery ". . . that petitioner should have a right to recover what he can prove by preponderance of the evidence he could have obtained through his own efforts if he had drilled, developed and operated his property outside the unitization project, that is, if no unitization had occurred." That deci-

sion, unsupported by the law and evidence, was a further taking of the property of petitioner without due process of law and without compensation for the oil recovered by the defendant and the amount of which recoverable oil was stipulated to by the defendant.

10. Petitioner then filed a motion for rehearing, but the same was denied by the Supreme Court of Nebraska on September 16, 1969.

Petitioner takes the position that the denial of his right to drill was the unconstitutional taking of his property without due process of law and was without compensation to him—even though defendant recovered the oil and made no compensation therefor. Actually, one might say that the net result is as follows:

(A) Petitioner, you cannot drill to recover the oil admittedly on your land.

(B) Defendant, you may waterflood the petitioner's lands and recover his oil except as to the limited amount that could be recovered by primary methods.

(C) Petitioner, you cannot recover any of the oil under your land which is being swept away by the defendant's operations but you, the defendant, can recover all secondary oil of petitioner's.

(D) Defendant, you may sweep your own secondary oil on to the petitioner's land but petitioner cannot recover any of that oil even if you, the defendant, are sweeping petitioner's secondary oil off his land.

It should be noted that for four years while petitioner was taking action to enforce his rights, that defendant was resisting those rights—and defendant was sweeping off the oil from petitioner's land because he could not drill, all as more fully illustrated by the following:

(A) Defendant appeared in the proceedings in 1961 when petitioner first sought the right to drill. (R: Par. 4, p. 19)

(B) Defendant appeared in the District Court proceedings and resisted the efforts of petitioner to have the Commission's order voided. (R: Par. 5, p. 20)

(C) Defendant opposed the granting of the permit in the subsequent hearings before the Commission.

REASONS FOR GRANTING THE WRIT

The decision of the Supreme Court of Nebraska should be reversed because it erroneously interprets Nebraska law in its aspect of the construction of property rights as guaranteed by the Constitution of the United States and the Constitution of the State of Nebraska.

1. The Nebraska Supreme Court erred in its interpretation of what is a "property right" both under the Nebraska law, the Constitution of the State of Nebraska, and the Constitution of the United States. That petitioner had a property right in the oil under his lands is supported by the case of *Krone v. Lacy,* 168 Neb. 792, 97 N.W.2d 588 (1959) where the Nebraska Supreme Court examined at length as to the nature of the interest in oil and gas in place and where the Supreme Court of Nebraska quoted with approval the language of *Broderick v. Stevenson Consolidated Oil Co.,* 88 Mont. 34, 290 Pac. 244, (1930) as follows:

> " . . . oil remaining in the ground before recovery is a part of the land and belongs to the owner of the land."

Also, in *Belgum v. City of Kimball,* 136 Neb. 744, 81 N.W.2d 205 (1957), where the issue was the determination of the respective rights of the City of Kimball and the

adjoining property owners in oil and gas produced from under the streets and alleys within township drilling blocks, the Supreme Court of Nebraska concluded as follows:

> "Where the fee to streets and alleys, and not merely easements thereon, is vested in the municipality, *it owns the minerals under the surface of the streets and alleys,* and the adjoining lot owners would have no right, title or interest in said minerals until such streets and alleys are vacated by the municipalities as provided by law." (emphasis added)

The Supreme Court of Nebraska, in the decision here complained of, did not overrule its own decisions in the Krone and Belgum cases, *supra*. It may have attempted to qualify the property right to the oil on the principle of injection of oil and that the party recovering the oil has the right to such oil—but such a qualification has no application here when the right to capture the oil under his land was denied the petitioner.

Article XIV of the Constitution of the United States provides in part as follows:

> " . . . nor shall any state deprive any person . . . of property without due process of law, nor deny to any person within its jurisdiction the equal protection of the laws."

The Constitution of the State of Nebraska provides in part:

> *Section 21 of Article I.* "The property of no person shall be taken or damaged for public use without just compensation therefor."

Section 3 of the Bill of Rights of the Constitution provides in part as follows:

> "No person shall be deprived of . . . property without due process of law."

In *Jenel vs. Green Island Drain Co.*, 12 Neb. 163, 10 NW 547 (1881) the Supreme Court of Nebraska held:

> "The legislators possess no authority, however, to take the property of one citizen and transfer it to another, even when full compensation is made.
>
> "The law guarantees to everyone the free use and enjoyment of his property, *and he can be required to surrender it only when it is required for public use, and upon full compensation being made.*" (emphasis added)

If the legislature could not take away the property of petitioner, how much less can the Supreme Court of Nebraska take away that property.

The Legislature of the State of Nebraska made no attempt to take the property of petitioner. In fact, it safeguarded that right even when enacting the provisions for unitization. As stated above, the legislature, in providing for unit agreement when approved by the Commission, enacted the following provision:

> "Such agreements bind only the persons who execute them, and their heirs, successors, assigns, and legal representatives" (57-910(10)).

There is no provision in the law that requires one to join a unit—but such a requirement is being imposed on petitioner by the Nebraska Supreme Court holding that since a fair offer to join the unit was made to petitioner that he was required to accept that offer or lose his property. Such a holding is directly contrary to the provisions of the Constitution of the State of Nebraska and the case law in

Nebraska. It should be further noted that petitioner was willing to accept the allocation of oil to his lands under the unit agreement; he did, however, object to an additional assessment being made against him, which assessment was also applicable to other parties. That was a negotiable item and the parties could not reach agreement as to the assessment.

But did not petitioner have that right of refusal? He negotiated in good faith—but such negotiations broke down—but that is no legal basis to hold that he therefore loses his property.

The Nebraska Oil and Gas Conservation Act fixes the rights of the parties. Said law stated if one did not join a unit, he was not bound thereby. This principle has been followed in some of the larger producing oil states where problems similar to the present one arose.

The right asserted by petitioner is the right to drill upon his property and develop the oil and gas in place thereunder. This is a right which has been recognized as a property right in decisions of the courts, based upon § 1 of the 14th Amendment of the United States Constitution. In *Richfield Oil Corporation v. Crawford,* 241 P.2d 1020 (1952), the District Court of Appeals of California pointed out that a long string of decisions supported this principle. There, the court quotes with approval language which states that this right (the right to drill) was one entitled to protection as much as was the property itself and that an undue restriction thereon was a taking for constitutional purposes equal to appropriation or destruction, *supra,* at 1025. Also, the United States Supreme Court, in *Ohio Oil Company v. Indiana,* 177 U.S. 190, 209, 205 Ct. 576 (1899) has said

> " They could not be absolutely deprived of this right (i.e. to drill and reduce to possession)

> which belongs to them without a taking of private property."

This deprivation and restriction of this right, by the decision of the Nebraska Supreme Court, is the taking in the constitutional sense complained of by the petitioner in this case.

A leading case, similar in the deprivation of the right complained of by petitioner here, is *Bernstein v. Bush*, 29 Cal. 2d 773, 177 P.2d 913 (1947) when the oil well spacing provisions of the Public Resources Code of California were involved. There the petitioners complained that their rights to drill and reduce to possession oil and gas were deprived by the spacing statutes which required certain minimum acreages upon which a well could be drilled. The Supreme Court of California, citing both the United States and California constitutions, held that the police power of the state could not be so exercised as to deprive petitioners of their right to drill for oil. Petitioners could not be deprived of their right to drill, of their right to reduce to possession the oil and gas under their lands, and that the test of confiscation was the denial to one of the property owners of the equal opportunity to develop and realize the benefits from his leasehold. To quote the words of the court:

> " . . . the mere *opportunity for voluntary pooling of interest does not afford equal protection within the meaning of the Federal and State Constitutions;* regulatory provisions which in effect prohibit the drilling of offset wells may amount to a denial of the equal protection of the law and a taking of private property without due process of law. *Equal protection is so denied where, as here, the law, and its application at least, does not afford adequate means of protection as a*

substitute for the right to drill an offset well." *Supra*, at 918 (Emphasis added)

This is exactly what the Supreme Court of Nebraska has failed to see, that merely affording an opportunity to participate does not provide equal protection of the law in the constitutional sense. The court fails to balance the right of the petitioner in its decision, and finds that the public policy of the state expressed in the conservation statutes overrides this property right of petitioner to drill. The Supreme Court of Nebraska also places considerable reliance on the asserted lack of profitability of any well drilled by petitioner. This objection was dealt with in *Halbouty v. Darcey*, 326 SW2d 528, (1959) in which the court of Civil Appeals of Texas said, in part,

> "The law recognizes the right of an owner to recover the oil and gas under his land as a vested right and one of which he cannot be deprived. . . . This being true the right is not to be denied because it appears to be uneconomical. This vested right to recover such oil and gas is to be considered in connection with the law of capture which is also recognized as a property right. . . . The probability that oil and gas from surrounding tracts would drain to the .48 acre tract could not be lawful reasons for denying the permit because such fact is only part of the law of capture."

The court also mentioned that an offer to pool was not relevant, since it, as here, was a matter of voluntary agreement only; and that later changes in rules, as here, were to in no event influence the outcome of the pre-existing action.

The only situations in which these rights as asserted by petitioner are allowed to be negated are those *in which adequate substitutes are provided by law*. The best example

of this is the California case of *Hunter v. Justices' Court of Centinela Tp., Los Angeles County*, 36 Cal. 2d 315, 223 P.2d 465 (1950). In response to the holding in the Bernstein case, *supra*, the California legislature amended the Public Resources Code of that state so as to provide for the involuntary inclusion of lands which would otherwise be considered too small an area for wells to be drilled upon, since they would be "public nuisances" otherwise, in the leaseholds on other surrounding lands for purposes of development of oil and gas. (Section 3608 of the Public Resources Code.) In addition, the Section provided for the distribution of a pro rata share of the landowners royalty to be paid to the interest in the lands so included, in no case such pro rata share being less than that to which they were entitled.

The question there was whether Section 3608 of the Public Resources Code provided an adequate substitute as required by the court in the Bernstein case, and the court held that it was an adequate substitution. In so doing, the court stressed that the Section in question guaranteed to such owner his share of a minimum royalty, and that the object of such provision was to prevent the situations in which some take all and leave others with nothing. The crucial point is that the court found that the Section was not an arbitrary and unreasonable method for achieving conservation of oil and equal protection of the several owners' rights to extract it. This protection is just what is lacking in the decision of the Nebraska Supreme Court. The court fails to apply a Nebraska law requiring protection of the correlative rights of all owners in the field. Here, petitioner had a right to drill and recover the oil underlying his land. The court is saying that this right of his is outweighed by the purposes of the oil and gas conservation law of the state but at the same time the Court fails to protect his rights which are expressly provided for in the statute; this it may not do.

In its application to petitioner Baumgartner, such public policy is in derogation of the constitutional right not to have property taken without due process of law or just compensation, and denies to petitioner equal protection of the law in that it denies petitioner protection of his correlative rights in the oil and gas. The decision of the Nebraska Supreme Court lacks just those elements needed to make such a deprivation a constitutional exercise of the police power. It does not afford the "adequate substitute" necessary to protect those who validly wish to exercise their rights to drill and produce oil and gas without joining a unit. As the Montana Supreme Court, in *Pattie v. Montana Oil & Gas Conservation Commission,* 145, Mont. 531, 402 P.2d 596, (1965) said

> " . . . Unless the Montana Act is flexible enough to permit the Commission to make orders with an eye to the interests of adjacent landowners in sharing in the common supply, a legislation would have to be held unconstitutional as a deprivation of property without due process of law, as happened in California." (citing Bernstein v. Bush, *supra*).

The decision of the Nebraska Supreme Court also fails to provide for the correlative rights of other landowners in its view of the exercises of the police power of the state and so must be held to be unconstitutional. It fails to offer protection, it fails to balance the rights of other landowners in the field, all as provided for in the Oil and Gas Conservation Act of the State of Nebraska. This balancing of the interest is crucial; to quote the Montana court in *Pattie, supra,*

> "Conservation legislation is an action of the police power, and in order to sustain it as a reasonable regulatory measure, it is necessary that

> the public's interest in preserving the natural resource be balanced with the landowners interest in developing and selling it . . . the interest of both the public and the landowners *must be considered. . .*" (Emphasis added)

Petitioner does not claim that the Nebraska regulations do not protect him, but that as interpreted by the Nebraska Supreme Court, his property rights as established by numerous court decisions are not protected, and as such, it is as to him a denial of equal protection of the law, a denial of due process of law, and an unconstitutional taking without compensation, all in violation of the Constitution of the United States and the Constitution of the State of Nebraska.

CONCLUSION

For these reasons, a writ of certiorari should issue to review the judgment and opinion of the Supreme Court of Nebraska.

Respectfully submitted,

Clinton & McNish,
Sidney, Nebraska

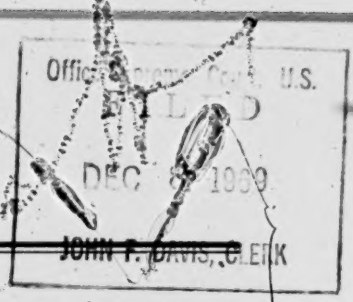
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IN THE

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October Term, 1969

No. 930

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and

THE STATE OF NEBRASKA,

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v.

GULF OIL CORPORATION,

Respondent

APPENDIX TO PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF NEBRASKA

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APPENDIX TO PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF NEBRASKA

APPENDIX

IN THE

SUPREME COURT OF THE STATE OF NEBRASKA

No. 37092

FRANKLIN W. BAUMGARTNER

Plaintiff and Appellee

THE STATE OF NEBRASKA

Intervenor and Appellee

v.

GULF OIL CORPORATION

Defendant and Appellant

Filed: May 9, 1969

SYLLABUS

1. Under the law of capture, an owner of land acquires title to oil or gas which he produces from wells on his land although part of the oil or gas may have migrated from adjoining wells. He may thus appropriate the oil and gas that have flowed from adjacent lands without the consent of the owner of those lands and without incurring liability to him for drainage.

2. Where primary recoverable oil has been exhausted, all interested parties in the field must be offered an opportunity to join in any unitization project to recover secondary oil on a fair and equitable basis.

3. Where a secondary recovery project has been authorized by the Nebraska Oil and Gas Conservation Commission, the operator is not liable for willful trespass to owners who refuse to join the project when the injected recovery substance moves across lease lines.

4. Orthodox rules and principles applied by the courts as regards surface invasions of land may not be appropriately applied to subsurface invasions arising out of the secondary recovery of oil and gas.

5. It is a basic and fundamental principle of all conservation legislation that the correlative and constitutional right of a landowner or leaseholder is not the right to drill but the right to recover his just and equitable share of the oil and gas underlying his property.

6. "Correlative rights," as used in oil and gas law, shall mean the opportunity afforded to the owner of each prop-

erty in a pool to produce, so far as it is reasonably practical to do so without waste, his just and equitable share of the oil or gas or both in the pool.

7. Where a unitization agreement has been approved by the Nebraska Oil and Gas Conservation Commission, an operator refusing to join the project is limited in any recovery of damages to the amount he can prove by a preponderance of the evidence he could have obtained through his own efforts if he had drilled, developed, and operated his property outside the unitization project.

Heard before White, C. J., Carter, Spencer, Smith, McCown, and Newton, ... and Ronin, District Judge. SPENCER, J.

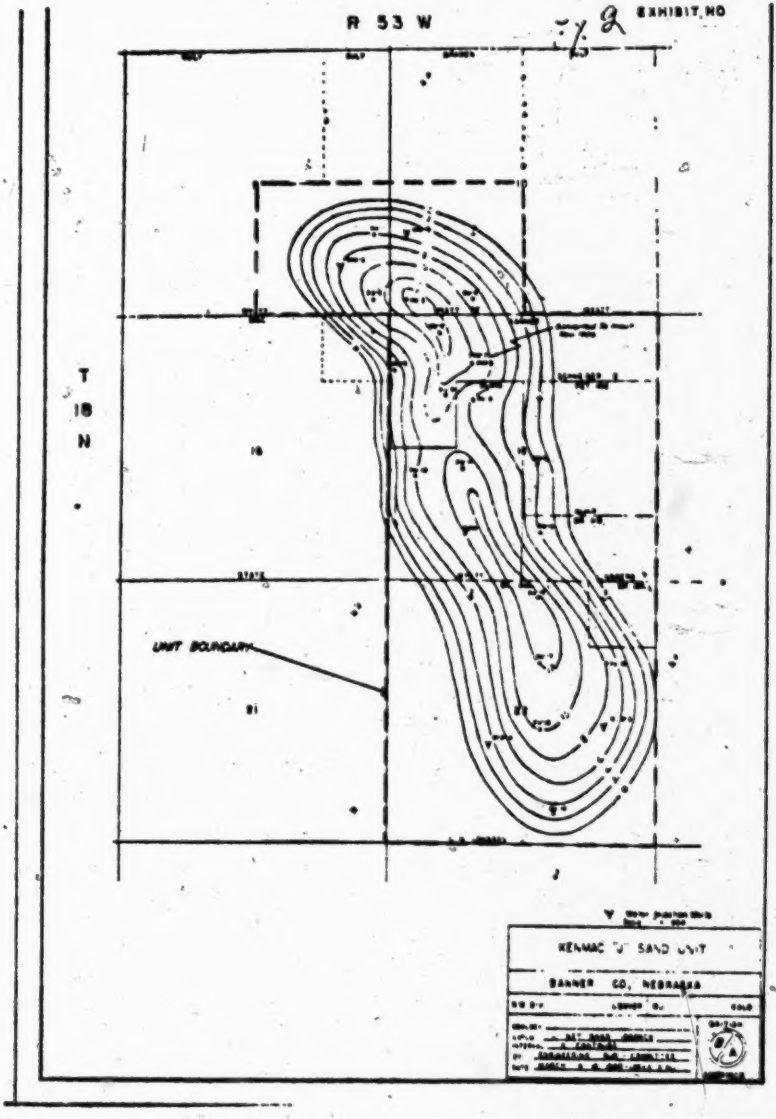
This is an action at law for willful trespass and conversion. Plaintiff sued for the value of oil claimed to have been displaced and swept from land under lease to him by defendant into its waterflood unit recovery wells.

Plaintiff was the holder of an oil and gas lease granted by the State of Nebraska, the owner of the minerals underlying Section 16, Township 18 North, Range 53 West of the 6th P. M., Banner County, Nebraska. Plaintiff acquired the lease June 13, 1960, and allowed it to lapse June 13, 1965.

Defendant is the owner of the Kenmac "J" Sand Unit, Banner County, Nebraska, hereinafter referred to as Kenmac, which was formed to increase the ultimate recovery of oil and to prevent waste. In consequence of the depletion of the field the lessees thereon had, before plaintiff obtained his lease, commenced studies as to the feasibility of unitizing the field. This involved the merger of all of the

interests in the oil pool and the designation of an operator for the unit. Defendant was so designated for Kenmac. Except for Kenmac there would have been no recovery of secondary oil. The Nebraska Oil and Gas Conservation Commission, hereinafter called the commission, entered an order April 24, 1961, approving the unit agreement, which provided for the secondary recovery of the oil by water-flooding. It was signed by all of the working-interest owners in the field except the plaintiff, and by the owners of more than 80 percent of the royalty interests, including the plaintiff's lessor, the Nebraska Board of Educational Lands and Funds. When the plaintiff refused to join the unit, Section 16 was excluded from it and plaintiff's lessor withdrew its consent.

Kenmac offsets plaintiff's lease on the east and the north. Exhibit 2, which is reproduced herewith, shows the boundaries of Kenmac as well as the outline of the oil-bearing stratum involved herein:



Waterflooding is the controlled introduction of water into an oil-producing stratum or oil reservoir for the purpose of recovering oil which cannot be produced by normal primary methods. Water is injected into selected wells to create pressure to force the oil toward producing wells. In this instance water was injected on the north into wells 1 and 2, and on the south into wells 3 and 4. These wells forced the oil toward wells 10, 11, and 12, the final point of recovery. In November 1964, it was necessary to convert well 7 to an injection well. The introduction of water into an oil reservoir causes oil and water to migrate across lease lines and it is impossible to restrict the advance of the water to lease lines. Because of this encroachment it is necessary to unitize a field to protect the correlative rights of all those holding interests in the field.

A prior lessee of Section 16 had drilled a dry hole in the northeast quarter of the section. This dry hole and other wells on the adjoining sections had established that the oil-bearing sands under plaintiff's lease were in the northeast quarter of the northeast quarter of the northeast quarter, hereinafter referred to as NENENE, with a thin and narrow strip along the east edge of the section.

Plaintiff's engineer testified that prior to the formation of the unit, oil had been drained from Section 16 by the off-setting wells to the north and the east. The 23 producing wells shown on the plat had so depleted the field that the nearest well offsetting plaintiff's lease had been temporarily abandoned because of insufficient production. The parties stipulated that as of June 6, 1961, there were only 2,254.2 barrels of recoverable primary oil, worth $6,063, under the plaintiff's lease. The amount of oil underlying Section 16 for recovery by secondary methods was stipulated to be 36,624.1 barrels, while the recovery from the entire reservoir was 1,658,955 barrels. It is undisputed that the cost of

drilling a well to recover the primary oil on Section 16 was far in excess of $6,063.

Plaintiff's engineer also testified that in the absence of Kenmac there would not have been any secondary oil recovered on Section 16. Plaintiff refused to join the unit, and after it was approved he applied for a permit to drill a well in the NENENE. This permit was refused by the commission because plaintiff was able to include his section in Kenmac, but its order was subsequently reversed by the district court. No well was drilled because the recoverable oil by this time had been swept from the section. Plaintiff's engineer conceded that if plaintiff had been permitted to drill a well on the NENENE it would have resulted in the drainage of oil from Kenmac. The testimony clearly would indicate that plaintiff could not have profitably developed his lease. In the absence of Kenmac no secondary oil could have been recovered from Section 16 so the independent development of Section 16 would have resulted in an economic loss except for the waterflooding by Kenmac.

Plaintiff's manager of operations, who was his principal witness, actually had been instrumental in setting up the unit agreement and the operator's agreement for Kenmac. This was before he entered plaintiff's employment in June 1962. He admitted that Kenmac was properly formed; that a common-assessment formula was used for all undeveloped acreages; and that the assessment formula and the amount allocated to plaintiff's tract were fair and equitable. Plaintiff refused to join the unit unless this assessment was waived as to his section. This the other parties to the agreement would not do, and plaintiff's section was excluded from the unit.

If the plaintiff had joined Kenmac and borne his share of the development and operating costs, his profit would

have been $27,455, and the State of Nebraska would have received $7,377 for royalties. The evidence would indicate that if plaintiff had drilled his own well, the highest estimate of his profit would be $12,224.

The trial court applied the common law doctrine of willful trespass, and entered judgment against the defendant in the amount of $89,933 for the value of the oil drained from Section 16, without the deduction of any development or operating costs necessary to produce that oil. Defendant perfected an appeal to this court.

This is a case of first impression in this state. However, in view of the objectives of the Nebraska Oil and Gas Conservation Act, hereinafter referred to as act, and the apparent public policy inherent therein, as well as the nature of oil and gas, we cannot accept the premise on which judgment was rendered by the trial court.

Section 57-901, R. R. S. 1943, provides as follows: "It is hereby declared to be in the public interest to foster, to encourage and to promote the development, production and utilization of natural resources of oil and gas in the state in such a manner as will prevent waste; to authorize and to provide for the operation and development of oil and gas properties in such a manner that the greatest ultimate recovery of oil and gas be had; and that the correlative rights of all owners be fully protected; and to encourage and to authorize cycling, recycling, pressure maintenance and secondary recovery operations in order that the greatest possible economic recovery of oil and gas be obtained within the state to the end that the landowners, the royalty owners, the producers and the general public realize and enjoy the greatest possible good from these vital irreplaceable natural resources.

"It is the intent and purpose of sections 57-901 to 57-921 to permit each and every oil and gas pool in Nebraska to be produced up to its maximum efficient rate of production, subject to the prohibition of waste as herein defined and subject further to the enforcement and protection of the correlative rights of the owners of a common source of oil or gas so that each common owner may obtain his just and equitable share of production therefrom."

Since the formation of Kenmac, our law has been amended to provide for compulsory unitization upon the approval of 75 percent of the production owners and those required to pay 75 percent of the development costs. S. 57-910.03, R. R. S. 1943. This case, however, must be decided under the law as it existed before the compulsory unitization amendment.

To appreciate the importance of the legislative policy, one needs only to understand the importance of secondary oil recovery in Nebraska. We quote herewith from reports made by the director of the commission to the Interstate Oil Compact Commission: " 'As in previous years, the recovery of secondary oil formed a prominent part of Nebraska's producing picture. To January 1, 1966, Nebraska reservoirs had contributed over 36 million barrels of secondary oil. This volume was recovered as a direct result of the application of secondary energy for production. The quantity represents 15 percent of all oil produced in the state since the original oil discovery in 1939.' (The Interstate Oil Compact Bulletin, June 1966)***

" 'At this time, 76 secondary recovery or pressure maintenance projects are underway in Nebraska — 72 involve water injection, two involve miscible slugs while one project consists of gas recycling and one involves both gas recycling

and water injection. Approximately 40 percent of Nebraska's current oil production comes as a direct result of the introduction of extraneous fluids into the State's reservoirs.' (The Interstate Oil Compact Bulletin, December, 1966)"

As plaintiff suggests, in Krone v. Lacy, 168 Neb. 792, 97 N. W. 2d 528, we quoted with approval the following from Broderick v. Stevenson Consolidated Oil Co., 88 Mont. 34, 290 P. 244: " 'Oil remaining in the ground before recovery is a part of the land, and belongs to the owner of the land;***.' " This statement, however, is subject to the qualification well expressed in Ohio Oil Co. v. Indiana, 177 U. S. 190, 20 S. Ct. 576, 44 L. Ed. 729: "No time need be spent in restating the general common law rule that the ownership in fee of the surface of the earth carries with it the right to the minerals beneath, and the consequent privilege of mining to extract them. * * * The question * * * is this: Does the peculiar character of the substances, oil and gas, which are here involved, the manner in which they are held in their natural reservoirs, the method by which and the time when they may be reduced to actual possession or become the property of a particular person, cause them to be exceptions to the general principles applicable to other mineral deposits, and hence subject them to different rules? True it is that oil and gas, like other minerals, are situated beneath the surface of the earth, but except for this one point of similarity, in many other respects they greatly differ. They have no fixed situs under a particular portion of the earth's surface within the area where they obtain. They have the power, as it were, of self-transmission. No one owner of the surface of the earth, within the area beneath which the gas and oil move, can exercise his right to extract from the common reservoir, in which the supply is held, without, to an extent, diminishing the source of supply as to which all other owners of the

surface must exercise their rights. The waste by one owner, caused by a reckless enjoyment of his right of striking the reservoir, at once, therefore, operates upon the other surface owners. Besides, whilst oil and gas are different in character, they are yet one, because they are unitedly held in the place of deposit. In Brown v. Spilman, 155 U. S. 665, 669, 670, these distinctive features of deposits of gas and oil were remarked upon. The court said:

" 'Petroleum gas and oil are substances of a peculiar character, and decisions in ordinary cases of mining, for coal and other minerals which have a fixed situs, cannot be applied to contracts concerning them without some qualifications. They belong to the owner of the land, and are a part of it, so long as they are on it or in it, or subject to his control, but when they escape and go into other land, or come under another's control, the title of the former owner is gone. If an adjoining owner drills his own land and taps a deposit of oil or gas, extending under his neighbor's field, so that it comes into his well, it becomes his property.' "

There is no claim for the oil which naturally migrated from Section 16 by reason of the offsetting wells to the north and east, because this is governed by the law of capture. Under the law of capture, an owner of land acquires title to oil or gas which he produces from wells on his land although part of the oil or gas may have migrated from adjoining wells. He may thus appropriate the oil and gas that have flowed from adjacent lands without the consent of the owner of those lands and without incurring liability to him for drainage. California Company v. Britt, 247 Miss. 718, 154 So. 2d 144.

The rule of capture is applied to oil which migrates without the introduction of extraneous substances into the oil-producing stratum to induce migration. Here an ex-

traneous substance, water, was injected into wells on adjoining sections which induce migration. It is this inducement which plaintiff alleges constitutes a willful trespass as to his property.

We cannot ignore the fact that the operation of Kenmac was specifically authorized and approved by commission, effective April 18, 1961, and that the project was at all times conducted in conformity with the order of the commission. Plaintiff concedes this fact, but maintains that the order of commission was applicable to only the lands in the unit, and that Section 16 was not a part of it. Although Section 16 was excluded from the project, everyone involved, including the plaintiff, would understand that there was no way to seal off the oil under Section 16 from the pool, and that from its very nature water injected into wells 1 and 2 would eventually reach the narrow portion of the reservoir in Section 16 and sweep oil from it. It is this very fact which required that plaintiff be afforded an opportunity to join the project. Plaintiff was offered this opportunity on a fair and equitable basis. As an oil operator, he was fully cognizant of the fact that unless the other operators in the field were willing to abandon the project and thus waste more than a million and a half barrels of recoverable oil, they would either be forced to meet his demand for an unreasonable return at their expense, or go ahead with the project without him and incur possible liability for sweeping oil from under his leased land in the process. They did the latter. Did they incur liability for willful trespass? We hold they did not. Plaintiff contends no issue of waste is presented in this case. We do not agree. Defendant's every action was premised on the prevention of waste.

We have reached the conclusion that where the primary recoverable oil has been exhausted, all interested parties in the field must be offered an opportunity to join in any

unitization project to recover secondary oil on a fair and equitable basis, and if any interested party refuses to join he should not be permitted to capitalize on that refusal. To hold otherwise would discourage unitization and encourage rather than avoid waste. Consequently, we hold where a secondary recovery project has been authorized by the commission the operator is not liable for willful trespass to owners who refused to join the project when the injected recovery substance moves across lease lines.

While the fact situation is not analogous, some of the language in Railroad Commission of Texas v. Manziel (Tex.), 361 S. W. 2d 560, 93 A. L. R. 2d 432, is pertinent herein. That case was a waterflooding operation on a lease rather than a unit basis. The regular location for a lease input well was 660 feet from the property line, but the commission authorized the appellant to place an input well 206 feet from the Manziels' property line. The evidence indicated Manziels were producing far in excess of the original oil in place on their land and, without the specific limitations of the water input well, would continue to obtain more than their fair share. The following language is of interest herein: "To constitute trespass there must be some physical entry upon the land by some 'thing,' Gregg v. Delhi-Taylor Oil Corp., Tex., 344 S. W. 2d 441 (1961); but is injected water that crosses lease lines from an authorized secondary project the type of 'thing' that may be said to render the adjoining operator guilty of trespass? * * *

"A problem analogous to the situation that confronts this court is found in instances where gas is produced, the gasoline content removed therefrom, and the dry gas reinjected into the original reservoir from whence it was produced to preserve bottomhole pressure; the process thus displacing the more valuable wet gas under adjoining leases with the dry reinjected gas. In Corzelius v. Harrell, 143 Tex.

509, 186 S. W. 2d 961, (1945), a person so reinjecting complained that the Commission's order did not reasonably adjust correlative rights. Apparently both parties assumed that when the substances were reinjected, the rules which were applicable before the original capture again applied. See: Note 1, Oil and Gas Reporter, 1171; Williams and Meyers: Oil and Gas Law, s. 204.5, footnote 1.

"In considerng the legal consequences of the injection of secondary recovery forces into the subsurface structures, one authority, Williams and Meyers, *supra,* has stated:

" 'What may be called a "negative rule of capture" appears to be developing. Just as under the rule of capture a land owner may capture such oil or gas as will migrate from adjoining premises to a well bottomed on his own land, so also may he inject into a formation substances which may migrate through the structure to the land of others, even if it thus results in the displacement under such land of more valuable with less valuable substances (e.g., the displacement of wet gas by dry gas).'

"Secondary recovery operations are carried on to increase the ultimate recovery of oil and gas, and it is established that pressure maintenance projects will result in more recovery than was obtained by primary methods. It cannot be disputed that such operations should be encouraged, for as the pressure behind the primary production dissipates, the greater is the public necessity for applying secondary recovery forces. It is obvious that secondary recovery programs could not and would not be conducted if any adjoining operator could stop the project on the ground of subsurface trespass. * * *

"The orthodox rules and principles applied by the courts as regards surface invasions of land may not be appropri-

ately applied to subsurface invasions as arise out of the secondary recovery of natural resources. If the intrusions of salt water are to be regarded as trespassory in character, then under common notions of surface invasions, the justifying public policy considerations behind secondary recovery operations could not be reached in considering the validity and reasonableness of such operations. See: Keeton and Jones: 'Tort Liability and the Oil and Gas Industry II,' 39 Tex. Law Rev. 253 at p. 268. Certainly, it is relevant to consider and weigh the interests of society and the oil and gas industry as a whole against the interests of the individual operator who is damaged; and if the authorized activities in an adjoining secondary recovery unit are found to be based on some substantial, justifying occasion, then this court should sustain their validity.

"We conclude that if, in the valid exercise of its authority to prevent waste, protect correlative rights, or in the exercise of other powers within its jurisdiction, the Commission authorizes secondary recovery projects, a trespass does not occur when the injected, secondary recovery forces move across lease lines, and the operations are not subject to an injunction on that basis. The technical rules of trespass have no place in the consideration of the validity of the orders of the Commission."

Plaintiff, who seeks to distinguish Railroad Commission of Texas v. Manziel, *supra,* from the instant case, calls attention specifically to the following language: "The Commission has two primary duties in the administration and the control of our oil and gas industry. It must look to each field as a whole to determine what is necessary to prevent waste while at the same time countering this consideration with a view towards allowing each operator to recover his fair share of the oil in place beneath his land."

California Company v. Britt, 247 Miss. 718, 154 So. 2d 144, involved a claim of willful trespass for drainage by owners of an unsigned fractional mineral interest against the operator of a voluntary unitization of an oil field, using a pressure maintenance program where their interest had been excluded upon their refusal to join the unit. The Mississippi Supreme Court held that the injection of gas into a unit well which swept oil from plaintiff's land onto the unit where it was produced by a unit recovery well, did not constitute a common law trespass. The following from that case is pertinent herein: "The theory of complainants' bill was a willful and malicious trespass by the defendant. Yet they failed to show that California committed any actionable wrong or breach of duty toward them. It drilled no well on the 20 acres in which appellees owned an unleased one-fourth mineral interest.

"Sun had no lease from them after 1954. Prior to that time, California offered appellees participation in the unit. The Brookhaven Unit was validly created, and was approved by the State Oil and Gas Board. Unit wells have been drilled in accordance with permits from the board. The board found that the unitization agreements would conserve natural resources, prevent waste, and result in a larger ultimate recovery from the field. * * *

"Since there was no invasion of appellees' mineral interest by drilling a well on it, and all of California's activities have been in accord with the requirements of the conservation act and orders of the board, this is one of those cases, somewhat unusual today, where the law of capture applies: The owner of land 'acquires title to the oil or gas which he produces from wells on his land, though part of the oil or gas may have migrated from adjoining lands. He may thus appropriate the oil and gas that have flowed from adjacent

lands without the consent of the owner of those lands, and without incurring liability to him for drainage.' * * *

"Owners of royalty or unleased mineral interests are entitled to come into a unitization program under fair, reasonable, and equal terms with other participants in the unit, similarly situated. The ideal is that each operator's share of production from the unit should be in exact proportion to the contribution which he makes to the unit. * * * The basis of participation in production is a complex factor. Essentially, the unsigned or 'window' interest would have to join in the unitization on the basis of equal, proportionate participation with others who are parties to the agreement, * * *."

Plaintiff predicates much of his case on Tidewater Oil Co. v. Jackson, 320 F. 2d 157. As we view that case, it is readily distinguishable from the instant one. There the court, applying Kansas law, affirmed a substantial judgment for damages when water injected by Tidewater broke through a semipermeable barrier between the leased property of the two parties and damaged Jackson's wells, which were still producing primary oil. Here there were no producing wells on Section 16, and the evidence is conclusive it was not economically feasible to drill one in the absence of Kenmac.

Plaintiff throughout his brief asserts that he was precluded from drilling his unorthodox well by the objections of the defendant, and that this action indicates the willfulness of defendant's trespass. There is no merit to this suggestion. Without passing on plaintiff's right to drill a well, we find the evidence is conclusive that it could not have been profitable except for Kenmac, and even plaintiff's witness admits it would have resulted in plaintiff recovering

secondary oil from Kenmac. Suffice it to say that we consider it to be a basic and fundamental principle of all conservation legislation that the correlative and constitutional right of a landowner or leaseholder is not the right to drill but the right to recover his just and equitable share of the oil and gas underlying his property. "Correlative rights" are defined in section 57-903, R. R. S. 1943, of our Oil and Gas Conservation Act, as follows: "Correlative rights shall mean the opportunity afforded to the owner of each property in a pool to produce, so far as it is reasonably practical to do so without waste, his just and equitable share of the oil or gas, or both in the pool; * * *."

Plaintiff was given every opportunity to secure his just and equitable share of the oil in the pool by being offered fair, reasonable, and equal participation with the other interested parties in Kenmac. He refused to participate as he had every right to do. As an oil operator we must assume that he was fully aware of the consequences of his refusal. While we agree he had a perfect right to refuse to join the project, he should not be rewarded because he did. Neither should he be permitted to recover what he would have received if he had assumed the risks of that project. To hold either way would serve to defeat the purpose of our conservation act and would promote waste by effectively discouraging the formation of secondary recovery units which are so essential to the oil industry in this state.

The statute provides and plaintiff insists his correlative rights in the oil underlying his lease must be protected. That oil, however, was oil which could not be profitably produced by primary methods. The evidence is also conclusive that plaintiff could not have recovered secondary oil except for Kenmac. Under the facts herein the most that plaintiff should have a right to recover is what he can prove by a preponderance of the evidence he could have

obtained through his own efforts if he had drilled, developed, and operated his property outside the unitization project; that is, as if no unitization had occurred. There is evidence that any operation by plaintiff would have resulted in an economic loss. If the testimony of his manager of operations is accepted, then the profit he could have realized from his own operations for both primary and secondary recovery would have been $12,224. This would be the limit of plaintiff's just and equitable share for oil displaced from Section 16 by Kenmac in the absence of other evidence.

The State of Nebraska originally signed the Kenmac agreement but was forced to withdraw its assent when plaintiff refused to sign. The State has made no attempt to prove the extent of lost royalty payments but has accepted in its entirety the plaintiff's presentation. Any recovery by the State must be determined under the rules enunciated above.

For the reasons enumerated, the judgment herein is reversed the cause remanded to the district court for retrial under the rule of damages enunciated above. Costs are taxed to the plaintiff-appellee.

Reversed and Remanded

NEWTON, J., dissenting.

Notwithstanding that I heartily concur in the facts and the propositions of law set forth in the majority opinion, I find that I must respectfully dissent from the result reached. The majority opinion relies basically upon two propositions of law. The first is the law of capture which basically provides that one who drills an oil well upon his own land may, without liability, pump the oil out from under his neighbor's land. The second is the rule pertaining to correlative rights which means that each owner of

property lying over a pool of oil shall be afforded an opportunity to obtain his just share of the oil.

The opinion is based upon the following facts. Plaintiff could not have profitably developed his lease. The amount of primary oil he could have recovered would not have paid for the expense of drilling. No secondary oil whatsoever could have been recovered without the efforts of the other owners who joined together in the organization referred to as Kenmac and instituted measures for the recovery of the secondary oil, each contributing his or its respective share toward the expense of such secondary recovery and each taking a proportionate risk of a profitable result. Plaintiff, in accordance with the rule of correlative rights, was afforded an opportunity to join in Kenmac, contribute to the expense, and share in the profit to be derived from the recovery of secondary oil. He refused to do so. Had he joined, the venture would have been a profitable one for him and for his lessor, the State of Nebraska.

The picture presented is one in which it is apparent that plaintiff would have lost money had he drilled a well and sought to recover primary oil. If he had drilled the well when Kenmac instituted its secondary recovery process, plaintiff might have been able to recover from his own well sufficient secondary oil to have shown a profit, but this profit could only have been realized through the efforts of the other owners who joined in Kenmac. The majority opinion states: "We have reached the conclusion that where the primary recoverable oil has been exhausted, all interested parties in the field must be offered an opportunity to join in any unitization project to recover secondary oil on a fair and equitable basis, and if any interested party refuses to join he should not be permitted to capitalize on that refusal. To hold otherwise would discourage unitization and encourage rather than avoid waste." I concur in this state-

ment of principle, but if this principle is to be applied, then plaintiff has no basis for recovery whatsoever and neither does plaintiff's lessor. Quite conclusively, plaintiff would have lost money had he made an attempt to recover his share of the primary oil and he could not have shown a profit without the efforts of Kenmac in producing secondary oil, a project in which he refused to join. If, therefore, he is permitted to recover, he is then being permitted to capitalize on his refusal to cooperate and to join in Kenmac.

In my opinion, the judgment should be reversed and the cause dismissed.

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In the

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1969

No. 930

FRANKLIN W. BAUMGARTNER and THE STATE OF NEBRASKA,
Petitioners,

VERSUS

GULF OIL CORPORATION,
Respondent.

On Petition for a Writ of Certiorari to the Supreme Court of Nebraska

BRIEF IN OPPOSITION

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January, 1970

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TABLE OF CONTENTS

	PAGE
Opinion Below	1
Jurisdiction:	
Jurisdiction is invoked under 28 U.S.C. 1257(3)	1
Question Presented	2
Constitutional Provisions and Statute Involved	2
Statement	4
Argument	7
Conclusion	10

TABLE OF AUTHORITIES

CASES:

Bandini Pet. Co. v. Superior Court, 284 U.S. 8 (1931)	8
California Co. v. Britt, 247 Miss. 718, 154 So.2d 144 (1963)	9
Champlin Ref. Co. v. Corp. Comm. of Okla., 286 U.S. 210 (1932)	8
Cities Service Gas Company v. Peerless O. & G. Co., 340 U.S. 179 (1950)	8
Hunter Co. v. McHugh, 320 U.S. 222 (1943)	8, 9
Ohio Oil Co. v. Indiana, 177 U.S. 190 (1900)	8, 9
Palmer Oil Corp. v. Amerada Pet. Corp., 334 U.S. 390 (1952)	7
Patterson v. Stanolind O. & G. Co., 305 U.S. 376 (1939)	8
Railroad Comm'n of Texas v. Rowan & Nichols Oil Co., 310 U.S. 573 (1940)	8

TABLE OF AUTHORITIES CONTINUED PAGE

Tidewater Associated Oil Co. v. Stott, 159 F.2d 174 (5th Cir. 1946), cert. den. 331 U.S. 817 (1947) ... 9

Walls v. Midland Carbon Co., 254 U.S. 300 (1920) ... 8

CONSTITUTIONAL PROVISIONS:

United States Constitution, Amend. XIV, § 1 ... 2

STATUTES:

Revised Statutes of Nebraska 1943, Reissue of 1960, § 57-901 ... 2-3, 6

Revised Statutes of Nebraska 1943, Reissue of 1960, § 57.910 ... 3

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Respondent.

On Petition for a Writ of Certiorari to the Supreme Court of Nebraska

BRIEF IN OPPOSITION

OPINION BELOW

The opinion of the Supreme Court of Nebraska (Pet. App. 1-21) is reported at 168 N.W.2d 510.

JURISDICTION

The judgment of the Supreme Court of Nebraska was entered on May 9, 1969. A timely petition for rehearing was denied on September 16, 1969. The petition for certiorari was filed December 8, 1969. This Court's jurisdiction is invoked under 28 U.S.C. 1257(3).

QUESTION PRESENTED

Does the Due Process Clause of the Fourteenth Amendment to the Constitution of the United States compel the State of Nebraska to impose upon the participants in a unit for the secondary recovery of oil by waterflooding, which was duly authorized and lawfully operated under the Nebraska Oil and Gas Conservation Act, liability for oil drained from an undeveloped offsetting lease which could not have been produced in the absence of unit operations, in which the offsetting lessee refused to join on a fair and equitable basis.

CONSTITUTIONAL PROVISIONS AND STATUTE INVOLVED

The Due Process Clause of the Fourteenth Amendment to the Constitution of the United States reads as follows:

> "nor shall any state deprive any person of life, liberty, or property, without due process of law." U. S. Const. amend. XIV, § 1.

The Nebraska Oil and Gas Conservation Act, Revised Statutes of Nebraska 1943, Reissue of 1960, §§ 57-901 - 57-921, provides in pertinent part:

> "**57-901. Oil and gas conservation; purpose.** It is hereby declared to be in the public interest to foster, to encourage and to promote the development, production and utilization of natural resources of oil and gas in the state in such a manner as will prevent waste; to authorize and to provide for the operation and development of oil and gas properties in such a manner that the greatest ultimate recovery of oil and gas be had; and that the correlative rights of all owners be

fully protected; and to encourage and to authorize cycling, recycling, pressure maintenance and secondary recovery operations in order that the greatest possible economic recovery of oil and gas be obtained within the state to the end that the landowners, the royalty owners, the producers and the general public realize and enjoy the greatest possible good from these vital irreplaceable natural resources.

"It is the intent and purpose of sections 57-901 to 57-921 to permit each and every oil and gas pool in Nebraska to be produced up to its maximum efficient rate of production, subject to the prohibition of waste as herein defined and subject further to the enforcement and protection of correlative rights of the owners of a common source of oil or gas so that each common owner may obtain his just and equitable share of production therefrom."

"57.910. Unit or cooperative development; agreement; effect. An agreement for the unit or cooperative development and operation of a field or pool, or a part of either, including those in connection with the conduct of repressuring or pressure maintenance operations, cycling or recycling operations, including the extraction and separation of liquid hydrocarbons from natural gas in connection therewith, water floods or any other method of operation, is authorized and may be performed, and shall not be held or construed to violate any of the statutes of this state relating to trusts, monopolies, or contracts and combinations in restraint of trade, if the agreement is in the public interest, protective of correlative rights, and reasonably necessary to increase ultimate recovery or to prevent waste of oil or gas. Such agreements bind only the persons who execute them, and their heirs, successors, assigns and legal representatives."

STATEMENT

This is an action at law for willful trespass and conversion of oil drained from petitioners' land by the underground migration across lease lines of water injected by respondent on the Kenmac "J" Sand Unit, which forced oil from petitioners' undeveloped lease onto the Unit, where it was produced by unit recovery wells.

The location of petitioners' land, the Kenmac Unit, and the contours of the oil bearing sand are shown on the plat which is a part of the opinion of the Supreme Court of Nebraska (Pet. App. 5).

Petitioners claimed and the trial court held that the underground migration of the oil and injected water was a willful trespass and, applying the common law rule of damages, entered a judgment against respondent of $89,933 for the value of the oil drained without the deduction of any costs of drilling and equipping the wells and of producing the secondary oil (Pet. App. 8).

The Supreme Court of Nebraska held that to apply the common law doctrine of willful trespass to the secondary recovery of oil by waterflooding was contrary to the public policy of the state and that the petitioners should be allowed to recover only such amount as petitioner, Baumgartner

> "could have obtained through his own efforts if he had drilled, developed, and operated his property outside the unitization project; that is, as if no unitization had occurred" (Pet. App. 18).

It remanded the case for a new trial under this rule of damages, since it considered that in one view of the evi-

dence, there might be no recovery, but in another view there might be a recovery of $12,224 (Pet. App. 19). The dissenting judge considered that the evidence was conclusive that there could be no recovery and that the judgment should be reversed and the cause dismissed (Pet. App. 19-20).

The Supreme Court of Nebraska adopted this rule of damages and rejected the common law doctrine of willful trespass in view of two facts which are noted in its opinion, but not in petitioners' statement of the case.

The first is that the petitioner, Baumgartner, "was given every opportunity to secure his just and equitable share of the oil in the pool by being offered fair, reasonable, and equal participation with the other interested parties in Kenmac. He refused to participate . . ." (Pet. App. 18).

This conclusion is not questioned by the petitioners, nor could it well be, since it is supported by the undisputed testimony of their own principal witness (Pet. App. 7) as well as by the order of the Nebraska Oil and Gas Conservation Commission which denied Baumgartner's application for a permit to drill an exception well on his lease (E 6: 54, 55, Vol. II). Baumgartner himself never offered any explanation for his refusal to pay his fair and equitable share of the intangible costs of the previously drilled wells taken over by the unit. It was because the other lessees declined to waive such payment that he refused to participate (Pet. App. 7). It is therefore undisputed on this record that the petitioner, Baumgartner, refused to join in Kenmac's secondary recovery operations on a fair and equitable basis.

The Supreme Court of Nebraska also based its decision upon the fact that "the operation of Kenmac was specifically authorized and approved by [the Nebraska Oil and Gas Conservation] commission, effective April 18, 1961, and that the project was at all times conducted in conformity with the order of the commission" (Pet. App. 12). It noted that such authorization and approval of Kenmac was in accord with the public policy of the state "to foster, to encourage and to promote . . . secondary recovery operations in order that the greatest possible economic recovery of oil and gas be obtained within the state to the end that the landowners, the royalty owners, the producers, and the general public realize and enjoy the greatest possible good from these vital irreplaceable natural resources." Rev. Stat. Neb. 1943, Reissue of 1960, § 57-901 (Pet. App. 8).

The court also noted the importance of the secondary recovery of oil to the economy of Nebraska, pointing out that approximately 40 per cent of the state's current production was secondary oil and that secondary oil represents 15 per cent of all the oil ever produced in the state (Pet. App. 9). It also noted that if petitioner's refusal to join the Kenmac Unit could have forced the other operators in the field to abandon the project, there would have ensued the "waste [of] more than a million and a half barrels of recoverable oil" (Pet. App. 12).

It was in view of these considerations that the Supreme Court of Nebraska declined to place the heavy burdens of a common law willful trespasser upon oil operators who fulfill Nebraska's public policy of conducting secondary recovery waterflooding operations and denied to oper-

ators who flaunt this policy, such as the petitioner, Baumgartner, the right to recover more than they could have recovered by their own independent operations in the absence of the waterflood.

ARGUMENT

The only federal question presented by this record and the decision of the Supreme Court of Nebraska is whether the State of Nebraska lacks constitutional power to limit the recovery of damages for oil drained from the lease of an operator who has refused to join in a unitized waterflood on a fair and equitable basis to the value of the oil that he could have recovered by his own independent operations in the absence of the waterflood.

Petitioners' contention that the state lacks such power does not present a substantial federal question in view of prior decisions of this Court upholding the constitutional validity of state regulation of the common law right of landowners to drill and produce at will on their land.

In its latest decision on the subject, this Court held that the contention that the Due Process and Equal Protection Clauses of the Fourteenth Amendment prevented Oklahoma from providing for the unitized management of common sources of supply of oil and gas "failed to raise any substantial federal questions." *Palmer Oil Corp.* v. *Amerada Pet. Corp.*, 343 U.S. 390, 391 (1952).

Similarly, it held to be "virtually without substance" the contention that the Due Process Clause prohibits Oklahoma from compelling a gas producer, who owns a pipeline

and has a market, to purchase rateably from a producer who does not at a price fixed by the state commission. *Cities Service Gas Company* v. *Peerless O. & G. Co.*, 340 U.S. 179, 185 (1950).

It held that "no substantial federal question" was presented by the contention that Louisiana was barred by the Due Process Clause from compelling the unitization of separately owned tracts into a single drilling or spacing unit. *Hunter Co.* v. *McHugh*, 320 U.S. 222, 227 (1943). The contention that Oklahoma does not have similar power likewise "failed to raise a substantial federal question." *Patterson* v. *Stanolind O. & G. Co.*, 305 U.S. 376, 379 (1939).

This Court has held that Oklahoma has the power to restrict oil production to market demand, *Champlin Ref. Co.* v. *Corp. Comm. of Okla.*, 286 U.S. 210 (1932), and that in allocating the allowable production between marginal wells and wells with high potentials, Texas may more severely restrict the production of the high potential wells. *Railroad Comm'n of Texas* v. *Rowan & Nichols Oil Co.*, 310 U.S. 573 (1940).

And it has upheld the power of California to restrict the volume of gas produced from oil wells to the amount which will result in the greatest ultimate recovery of oil, *Bandini Pet. Co.* v. *Superior Court*, 284 U.S. 8 (1931), the power of Wyoming to prohibit the production of natural gas for the manufacture of carbon black, *Walls* v. *Midland Carbon Co.*, 254 U.S. 300 (1920), and the power of Indiana to restrict the flaring of gas into the atmosphere to a period of two days following the completion of a well. *Ohio Oil Co.* v. *Indiana*, 177 U.S. 190 (1900).

The Nebraska Supreme Court has recognized in its decision here the same considerations which this Court recognized to be the basis of state power in the decisions cited. These are the prevention of physical and economic waste of oil and gas, the greatest ultimate recovery of oil and gas, and the protection of correlative rights to produce oil and gas. These considerations were first expounded by this Court in the leading case of *Ohio Oil Co.* v. *Indiana, supra.* They are the basis of the decision of the Supreme Court of Nebraska in this case.

The Supreme Court of Nebraska has not denied recovery of the value of the oil which Baumgartner could have produced by his own operations in the absence of the waterflood. In view of his refusal to share in the risks of the waterflood and his lessor's adoption of this refusal, the allowance of such recovery is an "equitable apportionment among landowners of the migratory gas and oil underlying their land" which is the hallmark of the validity of oil and gas conservation regulation. *Hunter Co.* v. *McHugh,* 320 U.S. 222, 227 (1943). Because of such refusal, other courts have denied any recovery whatever to dissenting landowners and lessees. *California Co.* v. *Britt,* 247 Miss. 718, 154 So.2d 144 (1963); *Tidewater Associated Oil Co.* v. *Stott,* 159 F.2d 174 (5th Cir. 1946), *cert. denied* 331 U.S. 817 (1947).

CONCLUSION

Thus there is no federal question of substance in this case and the petition for certiorari should be denied.

Respectfully submitted,

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